COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 052057-92**
Michael LaFlash	Employee
Mount Wachusett Dairy	Employer
Liberty Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Horan)

APPEARANCES
Dennis J. Ellis, Esq., for the employee
Nicole M. Edmonds, Esq., for the insurer

CARROLL, J. The employee appeals an administrative judge's decision denying and dismissing his claim for § 34A permanent and total incapacity benefits. The employee claims that the judge erred by impermissibly substituting his own opinion for that of the impartial psychiatric examiner on a medical issue. Because the judge found different facts from those relied on by the impartial psychiatrist, he was not bound to accept that opinion. Finding no error, we affirm the decision.

Michael LaFlash, who was thirty-five years of age at the time of the hearing, worked as a milk truck driver. He injured his right shoulder and cervical spine in 1992 when he jumped from a truck and fell while carrying some cases of milk. He was out of work for a few months, but was then able to return to work for over a year. In April 1994, Mr. LaFlash left work due to neck and right shoulder pain and headaches, and has not returned. In December 1996, he underwent a C5-6 diskectomy and fusion to repair a right-sided disc herniation which was compressing the nerve root. He contends that, since the surgery, he has had continuous neck and shoulder pain and headaches, which limit his sleep and

his functioning. He testified that he spends most of every day sitting down, and that lifting, prolonged standing, sitting and reading all exacerbate his pain. Mr. LaFlash maintains that his physical injuries and pain prevent him from working, and that his pain medication makes him groggy and unable to function. He further testified that he has become anxious and depressed as a result of his inability to work. (Dec. 4-5.)

The insurer accepted liability for the employee's physical injuries, and paid § 34 and § 35 benefits to exhaustion. (Dec. 3; Exh. 1, Employee's Hearing Memorandum; Insurer Br. 2.)[1] The employee filed a claim for § 34A permanent and total incapacity benefits beginning in April 2001, based on both a physical and a psychiatric disability.[2] (Dec. 2; Insurer Br. 2; Employee's Motion to Join Claims and Consolidate Claims for Conference, granted July 12, 2001.) Following a § 10A conference, an administrative judge awarded the employee ongoing § 34A benefits beginning on July 12, 2001. The insurer appealed to a hearing de novo. (Dec. 2.)

The medical evidence at hearing consisted of the § 11A reports and deposition testimony of a neurologist, Dr. Joseph D'Alton, and a psychiatrist, Dr. Zamir Nestelbaum. Neither party requested permission to submit additional medical evidence, and the judge found the reports of both examiners adequate. (Dec. 2-3.)

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[1] See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in the board file).

[2] A psychological claim which is a sequela of a physical injury is compensable under the simple "as is" standard of causation. Cirignano v. Globe Nickel Plating, 11 Mass. Workers' Comp. Rep. 17 (1997). In other words, the employee must only prove that the physical injury, even if now resolved, contributed to any extent to his emotional incapacity. Lagos v. Mary A. Jennings, Inc., 11 Mass. Workers' Comp. Rep. 109, 111 (1997).

The judge made lengthy findings, supported by the record evidence,[3] regarding Dr. D'Alton's opinions. Dr. D'Alton, the neurologist, opined that the employee had no objective evidence of any impairment. He noted only mild[4] limitations in cervical movements, and found no muscle weakness, atrophy or discomfort, and no pain behavior. The latest MRI showed a C4-5 disc herniation, but revealed no evidence of nerve root compression. (Diskectomy and cervical fusion had been performed at the C5-6 level.) Dr. D'Alton found the employee's subjective complaints regarding his right upper extremity unsupported by any

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[3] Dr. D'Alton's testimony follows in part:

> "[W]hen I examined Mr. LaFlash, I found that he had some limitation of neck movement in all directions, but I didn't find anything else that was objective on examination."

(Dep. 10.)

And further:

> Q: Did you find anything . . . by way of objective findings on examination that would explain any of Mr. LaFlash's complaints of radiating pain?
>
> A: No.
>
> Q: Did you find anything by way of objective findings that would explain Mr. LaFlash's complaints of pain, of any pain?
>
> A: No.

(Dep. 10.)

> Q: And is it your opinion to a reasonable degree of medical certainty that there's no objective explanation for Mr. LaFlash's subjective complaints?
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> A: I could not find any objective neurological abnormality when I examined him.

(Dep. 12.)

[4] Dr. D'Alton actually testified that the only finding he made when he examined the employee was "slight limitation of neck movement. I did not find any other objective abnormality." (Dep. 13.)

objective neurologic abnormality. Neurological findings were normal, except for abnormalities in his right hand, which had no anatomic basis and suggested functional overlay. (Dec. 5.) Deferring to the opinion of others with regard to the alleged psychiatric condition, (Dep. 18-19, 47-48), Dr. D'Alton opined that "the employee can return to work if he does not lift more than twenty pounds and is not required to bend or lift repeatedly. . . . [T]hese suggested restrictions exist only by virtue of the cervical diskectomy and . . . the employee has no current major physical limitations." (Dec. 5.) Dr. D'Alton didn't find any evidence to support anything other than a capacity for full time work. (Dep. 15.)

Dr. Nestelbaum, the impartial psychiatrist, opined that Mr. LaFlash is depressed because of his "chronic orthopedic and neurologic illness." (Dec. 6.) He did not believe that the employee suffers from depression independent of his medical condition, or that he has a major depressive disorder. (Nestelbaum Dep. 10.) Rather, he has a "mood disorder, depression, due to a medical condition, chronic pain syndrome and orthopedic and neurological impairment with depressive features." Id. at 48. Dr. Nestelbaum opined that the employee was totally disabled by the combination of his medical and psychiatric condition. (Dec. 6.) Since his specialty was psychiatry, he declined to give an opinion regarding the employee's neurologic and orthopedic condition, deferring instead to specialists in those areas. (Dec. 6; Nestelbaum Dep. 11-12.).

The judge adopted the opinion of Dr. D'Alton regarding the extent of the employee's physical disability and limitations. (Dec. 5-6.) Critical to his ultimate finding in this case, the judge did not find credible the employee's testimony "regarding his daily routine, his physical pain and limitations and his ability to perform any work." (Dec. 7.)[5] Rather, he found compelling videotape evidence submitted by the insurer which showed the employee mowing his lawn, shoveling

[5] More accurately stated, the employee claims he has an **inability** to perform any work. Suffice it to say the judge did not find this to be so.

snow, and repeatedly filling and emptying a large container of water. The judge found that:

> The employee's activities on the tapes are inconsistent with his testimony and the history he gave Dr. D'Alton on November 9, 2001 that any activity such as light housework or yard work aggravated his neck and right upper extremity and that he spends most of each day in a sedentary fashion sitting down. *I do not reconcile the employee's testimony with the videotape evidence or the history he gave Dr. D'Alton and Dr. Nestelbaum and I find that this videotape evidence destroys the employee's credibility*.

(Dec. 7-8.) (Emphasis added.)

Finding that "the employee mislead [sic] Dr. Nestelbaum to a conclusion that is not supported by the factual evidence," (Dec. 7), the judge rejected Dr. Nestelbaum's opinion that the employee was disabled because of a combination of physical injuries and depression. He concluded: "Since the factual predicates upon which the 11A opinion [of Dr. Nestelbaum] are based do not exist, the opinion is fatally defective and cannot have any probative value because of the lack of a foundation." Id.

Coming to the issue of causal relationship, the judge found as follows:

> I find that the employee's physical injuries are causally related to his employment. I do not find that his claimed psychiatric condition or depressive state exists and therefore there is no issue of causal relationship. I find that the history upon which Dr. Nestelbaum bases his opinion is deficient and inaccurate. I find that Dr. Nestelbaum's opinion that causal relationship exists between the industrial accident and the employee's mental condition fails for lack of a foundation.

(Dec. 9.)

The judge concluded that, though the employee had some physical restrictions as described by Dr. D'Alton (no lifting over 20 pounds and no repeated bending or lifting), they did not prevent him from performing remunerative work of a non-trifling nature. (Dec. 5, 9.) The judge adopted the opinion of the insurer's vocational expert that the employee, who had a tenth grade vocational education and a G.E.D., and had taken a bartending course and a

computer course, in 1994 and 1996 respectively, (Dec. 4), could work forty hours per week in a light duty sedentary job within the restrictions outlined by Dr. D'Alton. (Dec. 8.) He denied and dismissed the employee's claim for § 34A benefits, and ordered the insurer to pay reasonable and necessary medical expenses for the neurologic and orthopedic conditions, but not for the alleged psychiatric condition. (Dec. 10.)

The employee's appeal contends that the judge impermissibly substituted his lay opinion on causation for the expert medical opinion of Dr. Nestelbaum, the psychiatric impartial examiner, thereby ignoring its prima facie effect. The employee contests the judge's finding that he misled the impartial doctor, maintaining that the medical history given the psychiatric examiner is completely consistent with the physical activities the employee displayed on the videotape. He claims that he never indicated to Dr. Nestelbaum that he could not perform any of the activities recorded on the videotape, but said only that certain physical activities would result in increased pain and discomfort. (Employee br. 8-10.) Furthermore, the employee argues that it was incumbent on the insurer to confront Dr. Nestelbaum with the activities performed by the employee in the videotape and ask him directly whether those activities were inconsistent with the history he obtained. (Employee br. 11.) We find no reversible error.

Dr. Nestelbaum's opinion was prima facie evidence on the issue of the employee's psychological disability. As such, the judge could not reject it without a rational basis in the record for doing so. Behre v. General Electric Co., 17 Mass. Workers' Comp. Rep. 273, 276-277 (2003); Shand v. Lenox Hotel, 14 Mass. Workers' Comp. Rep. 152, 155 (2000); Simas v. Modern Continental Obayashi, 12 Mass. Workers' Comp. Rep. 104, 109 (1998); Paolini v. Interstate Uniform, 11 Mass. Workers' Comp. Rep. 322, 324 (1997). The judge's disbelief of the facts and history on which the impartial psychiatric opinion was based, including his disbelief of the employee's reports of pain to the examiner, provides such a rational basis for disregarding the § 11A opinion. Peroulakis v. Stop and Shop, 12

Mass. Workers' Comp. Rep. 93, 96 n.3 (1998); Daly v. City of Boston School Dep't, 10 Mass. Workers' Comp. Rep. 252, 257 (1996). See also Borawski v. Gencor Industries, Inc., 17 Mass. Workers' Comp. Rep. 542, 546 (2003)(judge's disbelief of employee's testimony as to pain and limitations is sufficient reason to reject treating physician's opinion of total disability).

Here, the judge rejected the § 11A psychiatric opinion because it was based on facts not found by the judge, i.e., that the employee suffered from a work-related chronic orthopedic and neurological illness, which included a chronic pain syndrome. (Dec. 6-10.) As noted above, Dr. Nestelbaum was careful to make no independent diagnosis of the employee's ongoing physical condition. On that issue, the judge adopted the opinion of Dr. D'Alton, the neurologic impartial examiner, who opined that the employee did not suffer from the chronic medical condition assumed by Dr. Nestelbaum; he had no pain behavior, no neurologic abnormalities, and only minor physical limitations based solely on his C5-6 diskectomy.[6] The judge did not credit the employee's testimony of pain and limitations. (Dec. 6-7.) Based on the videotape evidence, he was convinced the employee was "physically able to repeatedly stoop, bend, walk, shovel snow, lift full buckets of water and push and pull a lawnmower." (Dec. 7.) As we stated in Tran v. Constitution Seafoods Inc., 17 Mass. Workers' Comp. Rep. 312 (2003):

> The judge did not . . . "substitute his own opinion for that of the prima facie opinion of the Sec. 11A medical expert." As reflected in his decision, the judge simply did not believe the employee's complaints and, therefore, he was not bound to award compensation based on the § 11A doctor's medical disability opinion which assumed the veracity of those complaints.[7]

Id. at 319. (Footnote and citation omitted).

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[6] See supra, including but not limited to n.3 and n.4.

[7] In Tran, the § 11A opinion was not prima facie evidence, as additional medical evidence had been admitted. Id. at 319 n.6

In a similar case, we reversed a judge's award of benefits for a claimed psychological disability based on a physical injury. In Sfravara v. Star Market Company, 15 Mass. Workers' Comp. Rep. 181 (2001), the administrative judge adopted the impartial orthopedist's opinion that the employee's physical symptoms and pain were no longer related to her work injury. The employee's treating psychologist causally related her depression to her pain, but could not determine whether her work injury caused the pain. Thus, the psychologist's causation opinion was contingent on the impartial orthopedist's opinion to causally relate the employee's pain to the work injury, which he did not do. We held that the judge erred by attempting to make the causal connection himself, in the absence of any adequate medical opinion on causation. Id. at 182-185. In the instant case, Dr. Nestelbaum's opinion on causation and disability was contingent on the employee having a chronic orthopedic and neurological illness, including a chronic pain component which, based on the opinion of Dr. D'Alton and the judge's observation of the employee's activities on the videotape, did not exist. The judge's basis for rejecting Dr. Nestelbaum's opinion was thus rational.[8]

The record supports the judge's conclusion that, in the absence of chronic pain, limitations, or neurological findings, any psychiatric problems experienced by the employee are unrelated to the industrial accident.

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[8] When asked to assume that the employee's complaints of pain were unrelated to the industrial injury, he agreed that any psychiatric diagnosis flowing from the pain disorder was unrelated to the industrial injury. (Dep. 36.)

> Q: So, then, is it fair to say, Doctor, if it's determined that Mr. LaFlash's current physical status or his current complaints of pain are not related to the worker[s'] compensation accident, then any psychiatric diagnosis that flows from the pain disorder are likewise not related to the worker[s']compensation accident?
>
> A: I think that's fair.

A fair reading of Dr. Nestelbaum's testimony reveals that his final opinion on causation was dependent upon the employee's claimed ongoing disability, (Nestlebaum Dep. 47, 48, 50), which was not supported by the medical evidence or the testimony believed by the judge.

The employee argues, however, that the history of pain and daily activities the impartial doctor relied on in opining that the employee was totally disabled as a result of his physical and mental condition is consistent with the judge's findings. The employee claims that he never told Dr. Nestelbaum he could not perform any specific tasks, only that certain physical activities would result in increased pain and discomfort.[9] (Employee br. 9-10.) We find no merit to this argument. Credibility findings are arbitrary and capricious only if not based on the record evidence or reasonable inferences drawn therefrom and pertinent to the claim. Frey v. Mulligan, Inc., 16 Mass. Workers' Comp. Rep. 364, 366 (2002); Truong v. A.W.Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249 (2001). We do not find it unreasonable for the judge to infer, from watching the employee perform the activities recorded on the videotape, that the employee was not in the constant pain he claimed, did not have the limitations alleged, and did not spend his days in the way he testified. Similarly, we do not believe it was unreasonable for the judge to conclude that those activities were inconsistent with the information the employee provided to Dr. Nestelbaum. See note 9, supra. Particularly in light of Dr. D'Alton's findings of no neurological abnormalities, no

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[9] Dr. Nestelbaum reported that:

> Mr. LaFlash continues to complain of pain in his right shoulder, neck and arm with pain and numbness throughout all of his fingers on the right hand. He continues to complain of headache with pressure all the time, especially when he reads or is active physically.

Dr. Nestelbaum described the employee's typical day as follows:

> Mr. LaFlash reports that he goes to bed about 1:00 to 2:00 a.m. and gets up about 6:00 a.m. He reports doing light chores, setting a fire. He reports that he has difficulty at times doing the chores such as cooking and cleaning but that he tries to help. He goes shopping occasionally. He states that most of the time he is at home where he tries to fix things. He watched a lot of television in the past but states now that he is sick of it. He states that he avoids the daily stress of life because stress makes his pain and headaches worse. He also reports that he is fearful of going out because workers compensation is following him. He reports that they took a hidden film of him last year shoveling snow.

(Stat. Exh. 2B.)

pain behavior, and no muscle weakness, atrophy or discomfort, the judge's credibility findings are neither arbitrary nor capricious. See Tran, supra at 320; Lagos v. Mary A. Jennings, Inc., 14 Mass. Workers' Comp. Rep. 21, 25-26 (2000).

Finally, the employee argues that it was incumbent on the insurer to present the videotapes to Dr. Nestelbaum and specifically question him as to whether the depicted activities are inconsistent with the history he obtained. The employee seems to contend that, unless the impartial examiner comments on the videotape evidence, the judge may not draw any independent conclusions from such evidence. (Employee br. 11.) We disagree. We have held that it is "perfectly permissible to place the video tapes alongside medical records, oral history, medical tests and results of examination as the medical expert work[s] toward reaching an opinion on causal relationship and medical disability." Peroulakis, supra, at 96. We have also held that a judge must have an appropriate reason for denying a party the opportunity to show the impartial examiner a videotape. Crandall v. ELAD General Contractors, 16 Mass. Workers' Comp. Rep. 51, 57 (2002). However, we have never held that an impartial examiner *must* be shown a videotape which has been admitted into evidence. Here, the videotape was admitted into evidence without objection, and neither party requested permission to have either impartial physician view it. (Dec. 1; Tr. 59-61.) It did not thereby lose any evidentiary value. The judge is the arbiter of credibility. Just as he hears testimony of the employee and other witnesses which the impartial examiner does not hear, and bases his conclusions on that testimony, so may he view a videotape not seen by the §11A physician and draw reasonable inferences based on its content. As discussed above, the inferences drawn by the judge were reasonable. In Peroulakis, supra, we reversed a decision in which the judge impermissibly substituted his interpretation of the employee's abilities as depicted in a videotape for that of the impartial examiner. We distinguished that situation from one where the judge properly disagreed with an uncontradicted diagnosis based on finding a

different history than that given to the physician: "It is always open to the judge to make findings on the presence, intensity and duration of pain. If such findings materially change the history relied upon by the § 11A examiner, there would be basis for rejecting the opinion in whole or in part." Id. at 96 n.3.

That is what the judge did here. We see no error in the judge's reliance on the videotape in making his credibility determinations.

Accordingly, we affirm the decision of the administrative judge.

So ordered.

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Martine Carroll
Administrative Law Judge

Filed: **November 8, 2004**

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William A. McCarthy
Administrative Law Judge

HORAN, J., concurring. The administrative judge rejected Dr. Nestlebaum's opinion because it rested upon the doctor's belief that the employee's psychiatric condition was supported by an underlying "chronic orthopedic and neurological illness." (Stat. Exh. 2B.) Dr. Nestlebaum made no independent diagnosis of the employee's ongoing physical condition. (Dec. 6, Dep. 11.) Because the judge found no other sufficient factual basis for Dr. Nestlebaum's opinion, he was free to reject it. See Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586 (2000).

I agree there is no legal requirement that an ongoing psychiatric incapacity be supported by a concurrent work-related physical incapacity. See Lagos v. Mary A. Jennings, Inc., 14 Mass. Workers' Comp. Rep. 21 (2000)(psychiatric condition triggered by surgery as a result of work-related injury), (Lagos II), and Lagos v. Mary A. Jennings, Inc., 11 Mass. Workers' Comp. Rep. 109 (1997)(judge found no continuing incapacity due to physical injury, but did find incapacity based upon

resulting psychological condition), (Lagos I); Compare Sfravara v. Star Market Co., 15 Mass. Workers' Comp. Rep. 181 (2001)(award of incapacity benefits based on depression caused by pain was reversed due to lack of competent medical evidence that the pain was actually caused by the industrial injury).

I write separately to note that if Dr. Nestlebaum's opinion of the employee's incapacity was based on the occurrence of the industrial accident itself,[10] or attributed to the employee's work-related surgery,[11] the judge could not have so easily relied upon the videotape evidence to dismiss the unrebutted psychiatric opinion of the impartial medical examiner.[12] While evidence obtained via video investigation may extirpate the foundation of a medical opinion supporting an employee's claim of physical incapacity, caution is advised when such evidence is utilized to supersede an unchallenged § 11A psychiatric opinion in the aforementioned scenarios.

I concur.

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Mark D. Horan
Administrative Law Judge

[10] The doctor at first indicated the industrial accident alone caused the employee's psychiatric condition: "Q: And in this particular case it would be fair to say that the depressive disorder is secondary to the physical trauma, correct?" A: "Yes". (Depo. 47.) However, later at his deposition, the doctor explained his opinion was based on the employee's "chronic pain syndrome," (Depo. 48.), and his "medical/ neurological impairments." (Depo. 50.) Thus, a fair reading of his testimony *in toto* establishes that the doctor's final opinion on causation was dependent upon the employee's claimed ongoing disability, and was *not* based solely upon the injury itself. See Perangelo's Case, 277 Mass. 59, 64 (1931)(last stated medical opinion of physician accepted as final opinion).

[11] Lagos, 14 Mass. Workers' Comp. Rep. 21 (2000).

[12] E.g., Simas v. Modern Continental Obayashi, 12 Mass. Workers' Comp. Rep. 104 (1998)(uncontroverted § 11A report cannot be rejected unless based upon reasons supported by the record).